IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1791

WILLIAM L. KAY,

Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

WILLIAM L. KAY, the Petitioner herein, prays that a Writ of Certiorari issue to review the opinion and judgment of the Court of Appeals of the United States for the Fifth Circuit entered in the above-entitled case on January 17, 1977.

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals is not yet reported, but a copy of the slip opinion is printed in Appendix A attached hereto, *infra.*

JURISDICTION

The judgment of the Fifth Circuit Court of Appeals (Appendix B, *infra*) was entered on January 17, 1977. A timely filed Petition for Rehearing and Suggestion for a Rehearing En Banc was denied on May 17, 1977, without opinion (Appendix C). On May 25, 1977, an order was entered staying the mandate until June 16, 1977 (Appendix D). The Jurisdiction of the Supreme Court is invoked under 28 United States Code Section 1254(1).

QUESTIONS PRESENTED

I.

Whether the statute in question violates due process by failing, on its face, to give fair warning of what amounts to fraudulently obtaining a credit card.

II.

Whether the trial court denied Petitioner due process by its instructions to the jury that the law in question was violated if the Petitioner did not correctly anticipate that the credit card companies in question would want information not even asked of him on the application and that failure to supply this unasked for information would be fraud, if the information was material.

III.

Whether Petitioner's right of due process was violated when the jury was given erroneous instructions, as to what amounted to fraudulent obtainment, regardless of the correctness of the rest of the Court's charge.

IV.

Whether or not it violates due process for the trial court to instruct the jury in such a way that a finding of guilt of fraudulent obtainment of a credit card can be made when there was no duty on the part of the Petitioner to volunteer information not asked for the credit card applications.

V.

Whether or not it violates the Thirteenth Amendment, or alternatively, Due Process clause of the Fifth Amendment to make it a criminal offense for the Petitioner to fail to pay a debt, that he has previously agreed to pay, by allowing a jury to make a finding that the original promise to pay, coupled with the later failure to pay, was fraudulent on the part of the Petitioner.

STATUTES INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "No person shall * * * be deprived of life, liberty, or property, without due process of law * * *"

The Thirteenth Amendment to the Constitution of the United States provides in pertinent part as follows:

"Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States * * *"

Title 15 U.S.C. Section 1644, the statute under which the Petitioner was prosecuted:

"Whoever, in a transaction involving interstate or foreign commerce, uses any counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained credit card to obtain goods or services, or both, having a retail value aggregating $5,000 or more, shall be fined not more than $10,000 or imprisoned not more than five years, or both." Pub. L. 90-321, Title I, Section 134, as added Pub. L. 91-508, Title V, Section 502(9), Oct. 26, 1970, 84 Stat. 1127.

STATEMENT OF THE CASE

Case History

On January 15, 1975, Petitioner William L. Kay was convicted by a jury in the Federal District Court for the Northern District of Texas, Dallas Division, of two counts of violation of 15 U.S.C. 1644, Truth in Lending Act, for using two fraudulently obtained credit cards in purchasing retail goods and services in excess of $5,000 each. Petitioner received two four-year sentences to run concurrently.

Petitioner appealed his convictions to the Fifth Circuit Court of Appeals and, on January 15, 1977, his conviction was affirmed with Roney, J., dissenting. On May 17, 1977, Petitioner's Motion for a Rehearing was denied without opinion and the mandate was stayed by an order

entered May 25, 1977, until June 16, 1977, pending this Petition for a Writ of Certiorari.

Facts

On November 11, 1971, the Petitioner applied to Diners Club, Inc. (hereinafter "Diners") for a Diners credit card. This application, admitted as Government's Exhibit Q-1 and set forth in its entirety in the Record at pages 30, 31, and 32, contained the following language:

"Each cardholder assumes joint and several responsibility with company applicant or family head applicant, and agrees to be responsible for all charges." (R. 32).

After receiving this application, Diners mailed a financial statement, admitted as Government's Exhibit A-3, to New Era Printing, which Petitioner had indicated that he owned on his original application, and it was returned. (R. 34). If there was any fraud by Petitioner in obtaining the Diners card, then it would have to be based on the information contained in these two instruments, as they were the only communications between Petitioner and Diners prior to the card being issued. (R. 73).

On July 27, 1972, the Petitioner applied to AMOCO Oil Company through one of its divisions, American Torch Club (hereinafter "Torch Club"), for a credit card. This application, which was admitted as Government's Exhibit B-2, was solicited by the Torch Club from the Petitioner, because of previous satisfactory business dealings between the Petitioner and AMOCO, and in fact, the Petitioner was given a Funk and Wagnall Dictionary for making the application. (R. 105). The only fraud that the Petitioner could have used in obtaining the Torch Club card is the

information on this application, as this is the only information supplied by the Petitioner to the Torch Club prior to the issuance of this card. (R. 146).

Each of the credit cards was issued shortly after the Petitioner applied for them, and for approximately eight months after the issuance of each card minimal charges were made on the credit cards and were paid promptly. After this period of time, substantial charges, in excess of 5,000 dollars, were made on each credit card, which have not been paid by the Petitioner.

On the Diners Club application, the only minor deviation from the truth (it is admitted by the Government in its brief before the Fifth Circuit that this would not be sufficient to show a fraudulent obtainment) was that he was the owner of New Era Printing when, in fact, he was only owner of an undivided one-half interest. The Director of Credit and Collections for Diners, Mr. Padzik (R. 82), testified that this would not have made any difference in Diners Club issuing its card, and had Diners Club had the correct information, the card would have been issued. (R. 363, 364).

The only deviation from literal truth on the Torch Club application was the Petitioner showing his home address as the business address of New Era Printing, Inc. Again, the Government concedes, in its brief before the Fifth Circuit, that this would not amount to a fraudulent obtainment and, again, the Torch Club representative testified that he was aware of the criterion that his company would use in issuing the card, and that regardless of what address was shown as being the address for New Era Printing, Inc., that the card would have been issued. (R. 370, 371, 372).

The only factual representations shown by any of the evidence before the jury to not have been literally true were: 1) ownership of New Era Printing, and 2) the business address of New Era Printing, as set forth above; no evidence was put before the jury as to what Petitioner's annual income from sources other than New Era Printing was. It was not proven that at the time that he made the applications, that he did not make the $10,000.00 to $13,000.00 claimed on the Diners Club application, and over $9,500.00 claimed on the Torch Club application. The applications, contrary to what was erroneously urged by the Government in its brief before the Fifth Circuit, do not represent that the Petitioner made these amounts at New Era Printing, but rather, only that these amounts are his annual income.

It is upon the above-set forth representations of the Petitioner and the promise to be responsible for charges on the Diners application (the Government, in its brief before the Fifth Circuit, claims that there is a similar promise contained on Government's Exhibit B-2, the Torch Club application; this promise does not appear in the Record, and the Record, at pages 107 and 108, does not indicate its existence) that the Government sought to prove that the Petitioner was guilty of using two "fraudulently obtained" credit cards.

The Court of Appeals Opinion

The Court of Appeals held, with Roney, J., dissenting in a written opinion, that any error in the charge was harmless beyond a reasonable doubt because of the majority's finding that both companies had requested a representation as to Petitioner's intention to pay the charges incurred, thus reasoning that the jury must have found that this intention was misrepresented.

Although the majority admitted that it was conceivable that the charge broadened the scope of the statute "beyond permissible limits" and that the charge should have been limited to "misstatements, half-truths and omissions of matters fairly raised in the application," the majority felt that the jury was entitled to find from the evidence that, as a fact, Petitioner had misstated his intention to pay for the charges at the time he applied for his credit cards.

In his dissenting opinion, Judge Roney expressed the opinion that a charge that permitted a jury to find guilt on concealment of a fact, described as one that "a prudent credit company would require," was impermissibly broad and "not harmless at all."

REASONS FOR GRANTING THE WRIT

A. CERTIORARI SHOULD BE GRANTED IN THIS CASE TO DETERMINE WHETHER PETITIONER'S "DUE PROCESS" RIGHTS WERE VIOLATED BY THE DISTRICT COURT'S INSTRUCTION [Germane to Questions, I, II, III, IV, & V].

Petitioner was charged with and convicted of two counts of using a "fraudulently obtained" credit card to obtain the retail value of goods and services in excess of 5,000 dollars, in violation of 15 U.S.C. 1644, Truth in Lending Act.

The District Court instructed the jury that under the law, they could convict Petitioner of the crimes charged if they found that he had used credit cards that were fraudulently obtained, and went on to define fraudulently obtained as a card:

> "* * * obtained by statements of half-truths or the concealment of material facts as well as by affirmative statements or acts. A fact is material if it is a fact that a reasonably prudent credit company would require before issuing a credit card."

By this language, the Court was telling the jury the following three things:

1) that not only what the applicant told the credit card company, but also what he failed to tell the credit card company, could be fraudulent;

2) that the applicant's failure to tell the credit card company facts that were not inquired about on the application could be fraudulent if the jury deemed these facts to be "material";

3) that they, the jury, were to look at not only what the Defendant Kay told the credit card companies in this case, but also, what he failed to tell them, and determine if what he failed to tell them was "material," as defined, and therefore fraudulent.

Such jury instructions as were given in this case rendered 15 U.S.C. 1644 unconstitutionally vague for several reasons. The most obvious defect is that the charge left the legal meaning of the statute to conjecture, and a proscribed standard of conduct which ordinarily lends itself to specificity was thrown open to jury speculation. Secondly, common sense would tell any person of ordinary intelligence that all credit card applications are different; that even the various credit companies request and value different types of factual information pertaining to a person's credit rating. Thirdly, this charge broadened the

statute so that in this case, as well as in future cases to come, individual juries can make their own determination as to what information a credit company might require – thus letting the crime vary from jury to jury.

Vague and indefinite legislation has always run afoul of the Constitution. Our law requires fair notice contained in the law itself of the type of conduct that is prohibited. For example, in *Palmer v. City of Euclid,* 402 U.S. 544, 91 S. Ct. 1563 (1971), a municipal "suspicious person" ordinance which subjected to fine and thirty-day jail sentence any person "who wanders about the streets or other public ways or who is found abroad at late or unusual hours in the night without any visible or lawful business and who does not give a satisfactory account of himself" was held unconstitutionally vague in its application to the appellant, since it failed to give him fair notice that the particular conduct in which he had engaged came within the ordinance.

There is no evidence whatsoever in this case that told the jury about the requirements of that "reasonably prudent" credit card company. The evidence simply does not reveal what facts, if any, Petitioner omitted or concealed that such a company would have required or want to know.

Further, the Diners Club representative stated that it was only reasonable for an applicant to submit *only* the information requested on the application and not to volunteer anything else. (R. 369). The Torch Club representative also admitted that their card was issued to Petitioner because of his prior good record in holding an American Oil Company (AMOCO) credit card. (R. 126-127).

Neither the statute itself nor the jury instruction gave fair notice of the proscribed conduct. The interpretation of the law as given in the District Court's charge (and subsequently upheld by the Fifth Circuit) was unconstitutional because it allowed speculation by the jury as to the legal definition of "material fact." Thus, in the future, men of ordinary intelligence like Petitioner must necessarily guess at its meaning.

In the first place, the statute itself does not define "fraudulently obtained." In the second place, the charge only made the statute more vague and indefinite by telling the jury to speculate, when no evidence was before them on this point as to what facts a "reasonably prudent" credit company would want to know before issuing a credit card.

The most chilling aspect of the broadening effect of the District Court's charge is that even though all the facts contained in a credit card application are materially true and complete, credit card applicants in the future could be convicted of "fraudulently obtaining" credit cards. Even though the company had not been defrauded in the process of issuing the card by incorrect information, this would allow the jury to convict because it found that the applicant failed to volunteer certain information, and that a reasonably prudent credit card company would have wanted to know these facts.

If this conviction is allowed to stand, six months after a card is obtained, or a year, or six years, if an applicant charges retail goods and services in excess of the statutory amount (now lowered to 1,000 dollars by the 1974 amendments to the statute), and then failed to pay for such charges, a jury could find that such applicant "fraudulently

obtained" his credit card. The jury can now infer, according to the Fifth Circuit majority in this case, from an applicant's failure to pay subsequent to the issuance of credit cards, that the applicant *never* intended to pay, and thus, that the applicant obtained his credit card fraudulently, in violation of the statute.

In *Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964), this Court said:

> "There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise language. As the Court recognized in [citation omitted] * * *, the judicial enlargement of a criminal act by interpretation is at war with a fundamental concept of the common law that the crimes must be defined with appropriate definiteness."

In a closely analogous situation, *Lambert v. California*, 355 U.S. 225, 78 S.Ct. 240 (1957), where the defendant had been convicted of failing to register as required by a Los Angeles ordinance which made it unlawful for any person convicted of a crime punishable as a felony in California or of any offense in any place other than the state of California which would have been punishable as a felony in California, to be or remain in the city for a period of more than five days without registering with the police, this Court held that the ordinance in its application to a person who was not aware of the registration requirement was a denial of due process of law. According to Mr. Justice Douglas, who wrote the majority opinion, "actual knowledge of the duty to register or proof

of the probability of such knowledge and subsequent failure to comply are necessary before a conviction under the ordinance can stand." P. 229.

Since the District Court's instruction to the jury enlarged the definition of the crime, it was therefore void and incapable of consideration by the jury. The rewriting of statutes as opposed to statutory interpretation is beyond the power of Courts. *Gaddis v. Calgon Corp.*, 449 F.2d 318 (5th Cir. 1971). Therefore, because the Court's charge was void, as it defined "material fact," the entire instruction was improper as an inaccurate representation of the law applying to the case. The interpretation of the law by the District Court contradicts "due process" notions in that it allowed the jury to find fraud outside of any representation which Petitioner ever did make, or would ever make, to the credit company in filling out his application.

Another side of the "due process" questions involved is: does an erroneous portion of an instruction to the jury, given along with other correct instructions so prejudice a defendant as to constitute constitutional error incapable of being harmless?

If a case goes to the jury at all, it should go under proper instructions correctly declaring the legal principles involved. *United Mine Workers v. Pennington*, 381 U.S. 657, 14 L.Ed. 626, 85 S. Ct. 1585.

Before Constitutional error can be disregarded, it must be found harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L.Ed. 705 (1967).

The giving of the overly broad instruction on the law, as was done in this case, allowed the jury to speculate as to what was a "material fact" and therefore denied Petitioner "due process." The error was therefore not harmless beyond a reasonable doubt.

In deciding whether a constitutional right has been violated at all, this Court has held that the mere rational possibility of an infringement is enough to justify reversal of a trial in which the error is committed. *Chapman v. California, supra* (Stewart, J., Concurring).

In *Fahy v. Connecticut,* 375 U.S. 85, 86 (1963), this Court held that the test for determining whether an appellant's Fourth Amendment rights had been violated at trial was whether there was a reasonable possibility that the illegally seized evidence was considered by the jury notwithstanding the legal sufficiency of the remaining evidence.

In *Perez v. United States,* 297 F.2d 12 (5th Cir. 1961), the Fifth Circuit held that a rereading of the trial court's instructions requested by the jury after the charge had once been given that was inconsistent with the previous instructions was misleading and was confusing on its overall effect on the jury's deliberations and therefore constituted reversible error. In *Perez,* the Court further observed that the fact that one instruction is correct does not cure the error in giving another that is inconsistent with it. Therefore, looking at this case in the context of *Perez,* if a conflicting instruction can be held to have misled the jury to a defendant's detriment, then certainly an admittedly erroneous instruction can have the same effect or have even a greater tendency to mislead and confuse the jury and cause the rendition of an improper verdict of "guilty."

In *Mann v. United States,* 319 F.2d 404 (5th Cir. 1963), cert. den., 375 U.S. 986, 11 L.Ed. 2d 474, 84 S. Ct. 520, the Fifth Circuit held that error in an instruction on intent in an income tax evasion prosecution where the defense was lack of intent and willfulness, was plain error requiring reversal (even in the absence of an objection at trial) and that an erroneous instruction on intent could not be cured by an accompanying accurate charge on necessity of intent and on burden of proof. This case is directly on point with the instant facts and law, and clearly governs the issue raised herein.

In the case of *United States v. McCorkle,* 511 F.2d 477 (7th Cir. 1974), cert. den., 423 U.S. 826, the Court of Appeals for the Seventh Circuit held that erroneous trial court instructions on the issue of willfulness in an income tax case amounted to reversible error which was not cured by other instructions which correctly described the element of willfulness. In the *McCorkle* case, the Government contended that certain of the other instructions which were also given in the case correctly described the element of willfulness and so the charge as a whole was proper. The Seventh Circuit disagreed and, citing the *Mann* case as authority, in clear and unequivocal fashion stated the rule to be that:

> It is not enough to say that the total charge is rendered proper because the jury may choose to follow the correct statement of the law rather than the incorrect statement of the law. Having offered the incorrect instructions on the element of willfulness, *no additional instruction on willfulness, albeit correct, could neutralize the misstatement.* (511 F.2d at 477, emphasis added.)

In the general verdict of "guilty" rendered against Petitioner Kay, it is not clear whether the jury chose to follow, or did follow, the erroneously over-broad instruction, or whether the other statements of the law in the charge were relied upon by the jury. The Fifth Circuit held that evidently the jury here found that the Defendant misstated his intention to pay. This is just not evident from the verdict. It is just as likely that the jury followed the court's instructions that the Petitioner's concealment of the fact that he liked to gamble in Las Vegas, or travel to Hawaii, which the Government went to a great deal of trouble to prove, was "material," as defined by the court, and therefore fraudulent.

There was no misstatement by Petitioner of a material fact to either of the companies prior to his obtaining the credit cards. If a proper definition of fraudulent obtainment had been given by the trial judge to the jury, there would have been no evidence before the jury to support a guilty verdict on either count in the indictment.

B. CERTIORARI SHOULD BE GRANTED IN THIS CASE TO DETERMINE WHETHER THIS CONVICTION VIOLATES PETITIONER'S CONSTITUTIONAL RIGHTS UNDER THE THIRTEENTH AMENDMENT, OR ALTERNATIVELY THE FIFTH AMENDMENT, TO THE CONSTITUTION OF THE UNITED STATES.

The Government, in its brief before the Fifth Circuit, concedes that there was no factual statement on either of the applications that amounted to fraud. The majority opinion in the Fifth Circuit accurately points out that the Government's theory, by which it sought to support the findings of the jury of fraudulent conduct, was that the Petitioner misstated his intention to pay for the charges

at the time he applied for the cards. Aside from the fact that he did not promise to be "responsible" for these charges on the Diners Club card, but only agreed to be "responsible" for these charges (it not being clear from the Record what, if any, promise was contained on the Torch application), the majority below found that a misstatement of his intentions to pay would be sufficient to support a guilty finding as being fraudulent. In effect, the Government argues, and the majority below approves, that a promise to pay in the future, coupled with a failure to pay that debt in the future, can amount to a criminal offense of which a person can be prosecuted and convicted. This position is contrary to the Thirteenth Amendment's prohibition against involuntary servitude, as well as the Fifth Amendment's requirement of Due Process, and, in effect, subjects this Petitioner to a debtor's prison.

Petitioner submits to the Court that if Congress passed a statute making it a criminal offense to fail to pay debts to credit card companies, that this would be patently unconstitutional. The Government here argues for exactly the same thing, if its interpretation of the statute in question is to be followed, when it argues that the Petitioner was guilty of a criminal offense when he failed to pay the charges incurred on his credit cards, as this failure related to an earlier promise to pay, and could therefore be determined to be fraudulent. Petitioner submits that there is no real difference in a statute saying that a person will be imprisoned for failure to pay a debt to a credit card company, on the one hand, and on the other hand, a statute saying that if the credit card company, on its form application, incorporates a statement by the applicant that he would pay the charges incurred, can seek imprisonment of one of its customers who owes it money by simply proving the debt, and claim that the applicant

defrauded it when he promised to pay the charges incurred long before they were actually incurred.

In *Bailey v. Alabama*, 219 U.S. 219, 55 L.Ed. 191, 31 St. Ct. 145, this Court considered whether or not a person could be threatened with imprisonment because he failed to complete an employment contract that he had been advanced money on. The device used to imprison for failure to complete the employment contract was allowing the jury to find that the Defendant intended to defraud his employer when he took the money, and subsequently, did not complete the employment contract. This is exactly what the Government is claiming in this case (*i.e.*, that the Defendant took Diners Club and Torch Club services, and did not intend to honor his promise to pay for them, and that this amounted to a fraud). In striking down the conviction for fraud, this Court held that the mere failure to pay a debt cannot be the basis of a criminal conviction, even though it was argued there that before such a conviction could be had, that there must be a fraudulent intent found. The Court went on to say as follows:

> "The jury by their verdict cannot add to the facts before them. If nothing be shown but a mere breach of a contract of service and a mere failure to pay a debt, the jury have nothing else to go upon, and the evidence becomes nothing more because of their finding."

In the *Bailey* case, the Court went on to say:

> "There is not a particle of evidence of any circumstance indicating that he (the Appellant) made the contract or received the money with any intent to injure or defraud his employer.

> On the contrary, he actually worked for upwards of a month (just as the Petitioner here paid his charges incurred for approximately eight months on each card). His motive in leaving does not appear, the only showing being that it was without legal excuse and that he did not pay the money received. . . To say that he has been found guilty of an intent to injure or defraud his employer, and not merely for breaking his contract and not paying his debt, is a distinction without a difference to Bailey."

In the remarkably similar case of *Taylor v. State of Georgia*, 315 U.S. 25, 86 L.Ed. 615, 62 S.Ct. 415, the Appellant there failed to do the work that money was previously advanced for. Under the terms of the Georgia statute, the Appellant had the option of doing the work or returning the money advanced. In striking down a conviction of the Appellant when he failed to do either, this Court, at page 417, said:

> "Since the subsequent breach of the contract by the defendant, however capricious or reprehensible, does not establish a fraudulent intent at the initial stage of the transaction, the content which has been assigned to the phrase "without good and sufficient cause" by the Georgia courts is immaterial."

and thereafter citing *Bailey v. Alabama, supra.* There, the Appellee argued that the "without good and sufficient cause" amounted to a requirement that the State show proof of fraudulent intent before a conviction could be had. This argument was not accepted by this Court.

By these decisions, this Court has consistently refused to allow a failure to pay a debt to be the basis of a criminal prosecution, even when the criminal prosecution was couched in terms of the debt being incurred through fraud, which is precisely the situation presented by Petitioner in this case. It might be argued that the debt created in the two above-referred cases were the debts of labor, and therefore contrary to the anti-peonage statute, but in both cases above cited, the Appellant had the right to repay any funds previously advanced to him by the repayment of money.

In summary, Petitioner respectfully submits that Certiorari must be granted in this case, and the conviction of the Petitioner must be reversed, not only because Petitioner has been denied Due Process, but also because allowing the majority opinion in the Court below to stand will mean that any time that any person incurs more than 1,000 dollars in charges with a credit card company, and can't pay these charges for whatever reason, that if that person's application contained a promise to pay the charges incurred on the card, or be responsible for them, that this person can be prosecuted, without proof of any other facts, and if a jury chooses to interpret his failure to pay, along with a prior promise to pay, as fraudulent, then that person's conviction will stand because there is no constitutional prohibition against it. This goes beyond permissible limits in a free society such as ours.

CONCLUSION

Petitioner prays that this Petition for a Writ of Certiorari be granted or that alternatively, the Judgment of the Court of Appeals and the District Court be vacated and reversed without granting a Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

William Leonard KAY,
Defendant-Appellant.

No. 75-1677.

United States Court of Appeals,
Fifth Circuit.

Jan. 17, 1977.

Defendant was convicted in the United States District Court for the Northern District of Texas, at Dallas, Sarah Tilghman Hughes, J., on two counts of using a fraudulently obtained credit card to obtain goods and services having a retail value greater than $5,000 and he appealed. The Court of Appeals, Allgood, District Judge, held that although charge defining a material fact in application for credit card as one which a reasonably prudent credit company would require before issuing a credit card might broaden scope of statute beyond permissible limits, inasmuch as both credit card companies in fact requested a representation as to defendant's intention to pay the charges incurred, and jury found this intention to have been misrepresented, any error was harmless beyond a reasonable doubt; and that it was unreasonable for jury to conclude that defendant intended not to pay the charges at the time he applied for the cards.

Affirmed.

Roney, Circuit Judge, filed dissenting opinion.

* * *

Appeal from the United States District Court for the Northern District of Texas.

Before AINSWORTH and RONEY, Circuit Judges, and ALLGOOD, District Judge.

ALLGOOD, District Judge:

Appellant was convicted by a jury on two counts of using a fraudulently obtained credit card to obtain goods and services having a retail value greater than five thousand dollars, in violation of 15 U.S.C. § 1644. Kay received concurrent sentences of four years on each count. The issues raised on this appeal are whether there was sufficient evidence to support the verdict on both counts and whether the trial court's instruction that a representation made to a credit card company is material if a "reasonably prudent credit company would require [the representation] before issuing a credit card" renders the conduct proscribed by the statute uncertain and the statute vague. A brief account of the facts is necessary to consider these contentions.

Count One related to the misuse of a Diner's Club card. In February of 1971, Diner's Club, Inc., received an application from the appellant, William L. Kay. The application stated that Kay was the "owner" of New Era Printing and that his yearly income was from $10,000 - $13,000. Kay signed the application below a paragraph which stated, among other things, that "[e]ach cardholder . . . agrees to be responsible for all charges" made on the card.

From April, 1971 through December 1971, charges on this card were kept below $20.00 and were paid off regularly. Then in January, 1972, defendant charged $3,532.35; in February, $13,277.71; the March, 1972 billing showed an ending balance due of $19,248.46. Of this amount,

approximately $14,250 represented charges for airline tickets, with restaurant and other subsistence charges making up the balance. The card was picked up on February 22, 1972.

Count Two concerns an American Oil Company Torch Club credit card which Kay applied for in July of 1972. The application stated that Kay's business address was 9877 Brockbank, Suite 130, and his annual income was in excess of $9,500. The application was signed by the appellant under certain paragraphs which stated that the "[b]uyer agrees to pay American . . ." either the balance owed within 25 days or the balance plus a finance charge if not paid within 25 days.

Between August, 1972 and January, 1973, charges on the card were nominal and regular payments were again made. In February, 1973, defendant charged $7,919.53 on the card; in March, $35,338.32 was charged, bringing the total balance owed to around $45,000.

Each of the representations made on the applications relating to the appellant's ownership interest in New Era, income, and business address, were false in some respect. Representatives of Diner's Club and American Oil, however, testified that the cards would probably have been issued had the true facts been known.

[1] Appellant argues that, because the companies would have issued the cards in spite of the false statements, these misrepresentations could not have been material, a necessary element in proving fraud in the obtaining of the cards. However, the Government's theory, which was evidently found as fact by the jury, was that appellant misstated his intention to pay for the charges at the time he applied for the cards. Clearly, these companies would not

have issued the cards had they known of appellant's intent not to pay and we therefore find the misrepresentations here material. *United States v. Krause*, 507 F.2d 113 (5th Cir. 1975).

Appellant also complains of the charge which defines a material fact as one which a "reasonably prudent credit company would require before issuing a credit card." It is contended that this instruction allows the jury to convict where no representation was in fact required by the company or made by the applicant and would require the applicant to guess at what information should be supplied. The effect, appellant urges, is to make the standard of criminal conduct unknown and therefore the statute vague in violation of due process.

[2] It is conceivable that the charge may broaden the scope of § 1644 beyond permissible limits and it should have been limited to misstatements, half-truths and omissions of matters fairly raised by the questions in the applications. In the instant case, however, both companies in fact requested a representation as to the appellant's intention to pay the charges incurred, and the jury found this intention to have been misrepresented. Any error, therefore, was harmless beyond a reasonable doubt. See *Kotteakos v. United States*, 328 U.S. 750, 764, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946).

[3] Finally, appellant challenges the sufficiency of the evidence that the cards were fraudulently *obtained* rather than simply misused after having been properly obtained. Viewing the evidence in a light most favorable to the Government, *Glasser v. United States*, 315 U.S. 60, 62 S. Ct. 457, 86 L.Ed. 680 (1940), we cannot say that it was unreasonable for the jury to conclude that Kay intended not to pay the charges at the time he applied for the cards.

The evidence revealed a remarkable similarity in the pattern on both cards of charging nominal amounts for several months and then suddenly and grossly abusing the credit extended to him. While the Government's position is somewhat stronger with respect to the abuse of the second card, the intent not to pay at the time of the first application may reasonably be inferred from the appellant's subsequent course of conduct. *United States v. Cochran*, 499 F.2d 380 (5th Cir. 1974), cert. denied 419 U.S. 1124, 95 S. Ct. 810, 42 L.Ed. 2d 825; *United States v. Rodriquez*, 474 F.2d 587 (5th Cir. 1973); *United States v. Goodwin*, 470 F.2d 893 (5th Cir. 1972), cert. denied 411 U.S. 969, 93 S. Ct. 2160, 36 L.Ed. 2d 691. The verdicts on both counts are therefore supported by sufficient evidence and these convictions must be affirmed.

RONEY, Circuit Judge, dissenting:

I respectfully dissent. The only substantial issue of fact in this case is whether Kay "fraudulently obtained" the two credit cards involved. The Court holds that the jury could have found that when Kay obtained the cards, he intended not to pay the substantial charges that he would make against the cards several months after issuance. His failure to disclose this intention amounted to fraud.

In convicting on this theory, the jury was charged that the evidence would have to show that Kay obtained the cards by misrepresentation or concealment of a material fact. The court then made the charge to which the defendant takes exception: "A fact is material if it is a fact that a reasonably prudent credit company would require before issuing a credit card." Although the majority admits that such charge *might* impermissibly broaden § 1644, in my judgment it clearly does so. Although we do not have to decide the issue here, I have little doubt

that a statute which made it a crime to conceal from a credit card company a "fact that a reasonably prudent credit company would require before issuing a credit card" would be unconstitutionally vague.

The defects are obvious. First, such a statute would leave to conjecture a standard of conduct that lends itself to specificity. Second, varied credit card application forms clearly indicate that even credit companies do not agree on what they should prudently require, even if Congress might have some undisclosed specific standard in mind for such a statute. Third, such a statute would leave the determination to individual juries of what a prudent credit company would require, thus letting the crime vary from jury to jury. Fourth, the grand jury and the petit jury could use different standards so that a defendant might stand convicted by a petit jury of acts with which he had not been charged by the grand jury.

Significantly, there is no evidence whatsoever in this case about the requirements of prudent credit companies. Kay's jury received no evidence by which it could determine if what he concealed was what a prudent credit company would require. To the contrary there is positive evidence that the minor misstatements Kay made on his application would not have deterred these two companies from issuing the cards.

The majority of this panel holds the charge to be harmless beyond a reasonable doubt. This cannot be so, however, because the Court posits its holding as to evidence sufficiency on the fact that Kay intended not to pay the charges. Neither company asked Kay whether he intended to pay the charges. The Diners Club application states that Kay "agrees to be responsible for all charges." And

he is, of course, responsible. He has never denied that. The Torch Club application agrees that all purchases charged under the card "is indebtedness of buyer." The charges are his indebtedness. He has never denied that. He agreed to pay them in one of two ways. Kay has broken these agreements. For that he is legally liable. But at no place on either application is Kay asked to give his state of mind.

Hornbook contract law holds that where a contract is clear, a state of mind is irrelevant to its enforcement. The credit companies asked for, and obtained, legally enforceable agreements with Kay. The crucial act for which Kay stands convicted, however, is failing to tell the companies that in his mind he did not intend to fulfill his agreement. A reasonably prudent company, even a reasonably imprudent company, might not issue a card to an applicant who did not intend to pay, unless it thought the applicant available, solvent and legally responsible so that it could collect in any event. The agreement after all does carry a generous rate of interest on unpaid balances which are rather easily collectible through legal process against substantial borrowers.

In any event, on analysis, a charge that permits the jury to find guilt on concealment of a fact that a prudent credit company would require becomes the keystone to Kay's conviction. If the concealed fact is intent, this charge is not harmless at all. I would hold that this charge misconstrues the statute under which Kay was charged and injected reversible error into his trial.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 75-1677

D. C. Docket No. CR-3-74-362

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WILLIAM LEONARD KAY,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

Before AINSWORTH and RONEY, Circuit Judges, and ALLGOOD, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

January 17, 1977

RONEY, Circuit Judge, dissenting.

Issued as Mandate:

APPENDIX C

UNITED STATES COURT OF APPEALS
Fifth Circuit

EDWARD W. WADSWORTH
Clerk
OFFICE OF THE CLERK
TEL 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA. 70130

May 17, 1977

TO ALL PARTIES LISTED BELOW:

NO. 75-1677 – USA v. William Leonard Kay

Dear Counsel:

This is to advise that an order has this day been entered denying the petition(s) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By /s/ Susan M. Gravois
Deputy Clerk

/smg

cc: Mr. Randy Taylor
Ms. Judith A. Shepherd

APPENDIX D

[Filed May 25, 1977]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

* * *

No. 75-1677

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WILLIAM LEONARD KAY,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

---

ORDER:

( ) The motion of _____ for stay of the issuance of the mandate pending petition for writ of certiorari is DENIED. See Fifth Circuit Local Rule 15, as amended January 11, 1972.

(X) The motion of appellant for stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including June 16, 1977, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be

filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion for a further stay of the issuance of the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion for a further stay of the issuance of the mandate is DENIED.

/s/ Robert Ainsworth, Jr.
UNITED STATES CIRCUIT JUDGE

UNITED STATES COURT OF APPEALS
Fifth Circuit

EDWARD W. WADSWORTH
Clerk OFFICE OF THE CLERK 600 CAMP STREET
NEW ORLEANS, LA. 70130

May 25, 1977

Mr. Randy Taylor
Attorney at Law
908 Main Bank Bldg.
Dallas, TX 75202

No. 75-1677 – USA v. William Leonard Kay

MANDATE STAYED TO AND INCLUDING
June 16, 1977
(SEE ORDER ENCLOSED)

Dear Counsel:

The court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with the clerk of this court a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 21(1) of the Supreme Court effective July 1, 1970, a record is no longer required in connection with an application for writ of certiorari, and therefore will not be routinely prepared by this office (38LW 3502).

A copy of the opinion, judgment and denial of rehearing are still required by the Supreme Court to be incorporated as an appendix to your petition. Enclosed are copies of the said documents which have been entered in this cause.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By /s/ Susan M. Gravois
Deputy Clerk

enc:

cc and enclosure to:

Ms. Judith A. Shepherd

No. 76-1791

In the Supreme Court of the United States

OCTOBER TERM, 1977

WILLIAM LEONARD KAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

JEROME M. FEIT,
KATHERINE WINFREE,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1791

WILLIAM LEONARD KAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 545 F.2d 491.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on January 17, 1977. A petition for rehearing was denied on May 17, 1977 (Pet. App. C). The petition for a writ of certiorari was filed on June 15, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court's instructions to the jury, defining the term "fraudulently obtained" in 15 U.S.C.

1644, rendered the statute unconstitutionally vague or overbroad.

2. Whether, in the circumstances of this case, petitioner was unconstitutionally subjected to criminal penalties merely for nonpayment of a debt.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted on two counts of using a fraudulently obtained credit card to obtain goods and services having an aggregate retail value in excess of $5,000, in violation of 15 U.S.C. 1644. He was sentenced to concurrent terms of four years' imprisonment. The court of appeals affirmed, one judge dissenting (Pet. App. A).

1. The evidence at trial showed that in February 1971 petitioner filed an application for a credit card with Diner's Club, Inc., in which he stated, *inter alia*, that he was the "owner" of New Era Printing, Inc. (although in fact he owned only an undivided half interest in that business), that his annual income was between $10,000 and $13,000, and that he had additional income of $3,000 from interest and stock investments (Tr. 30-31, 211). Petitioner signed the application below a paragraph which stated in part that "[e]ach cardholder * * * agrees to be responsible for all charges" made on his card (Tr. 32).

From April through December 1971, petitioner's monthly statements for use of his Diner's Club card reflected minimal charges, which were regularly paid (Tr. 36-38). In December 1971, however, petitioner used the card to finance a trip to Hawaii for himself and a companion (Tr. 234-237). In addition, during the next several months petitioner charged substantial other expenses on his Diner's Club card, for which he did not pay. His March 1972

statement showed an outstanding balance due of $19,248.46, with some $14,250 representing charges for airline tickets (Tr. 39-41).[1] As a result, petitioner's credit card was recalled and picked up during an attempted use (Tr. 44-45). Shortly thereafter, petitioner (who was then using an alias) was located by a creditor and was informed that several persons had been searching for the rented car he was driving. Petitioner immediately responded: "[T]here is nothing wrong with the credit card I used to rent that car" (Tr. 287-288).[2]

2. In July 1972, petitioner applied to the American Oil Company for an American Torch Club membership account (Tr. 105-106). The application stated that petitioner's annual income exceeded $9,500, that he was employed by New Era Printing, Inc., and that his business address was 9877 Brockbank, Suite 130, Dallas, Texas (which actually was the address of an apartment leased to him) (Tr. 107-108, 240, 245, 250). Petitioner signed the application under paragraphs which stated that the "[b]uyer agrees to pay American" either the balance owed within 25 days or the balance plus a finance charge if not paid within 25 days (Tr. 104; G. Ex. B-2; Pet. App. 3a).

As had been his practice with the Diner's Club card, petitioner's charges on the American Torch Club card during the first few months after its receipt were insubstantial and were regularly paid (Tr. 111-114). In February and March 1973, however, petitioner charged $7,919.53 and $35,338.32, respectively, bringing the total unpaid balance to $43,951.31 (Tr. 114, 120, 147-149,

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[1]These charges formed the basis for count 1 of the indictment.

[2]Although this conversation did not relate to the credit cards alleged to have been fraudulently obtained, the evidence was admitted to show petitioner's criminal intent and state of mind at the time of the events alleged in count 1 (Tr. 289).

152-153).[3] During at least part of this period of time, petitioner gambled substantial sums of money in Las Vegas, Nevada (Tr. 261, 266, 276-282).

3. Petitioner introduced evidence that, prior to 1971, he had obtained and repaid a number of bank loans (Tr. 313-343). Moreover, the defense established that the Diner's Club card would have been issued even if petitioner had disclosed that he was not the sole owner of New Era Printing (Tr. 364) and that he probably would have received the American Torch Club card even if his application had correctly identified the Brockbank address as that of his residence, rather than his business location (Tr. 374). The government contended, however, and the jury evidently found, that petitioner misstated his intention to pay for all charges incurred through use of his credit cards at the time he applied for the cards (Pet. App. 3a).

ARGUMENT

1. The district court instructed the jury as follows (Ch. 2)[4]:

> A credit card is fraudulently obtained if the statement or representation made to the issuing company in order to acquire the credit card at issue is wilfully made and known to be untrue, or made with reckless indifference as to its truth or falsity, and made or caused to be made with the intent to deceive.
>
> A credit card may be fraudulently obtained by statements of half truths, or the concealment of material facts, as well as by affirmative statements or acts. A fact is material if it is a fact that a reasonably

[3]These charges formed the basis for count 2.

[4]"Ch." refers to the transcript of the court's charge to the jury, a copy of which is being lodged with the Clerk of this Court.

> prudent credit company would require before issuing a credit card.

Petitioner contends (Pet. 8-16) that these instructions unconstitutionally broadened the reach of the statute and also rendered it impermissibly vague (Pet. 8-16).[5] This argument, however, ignores the settled rule that the validity of jury instructions cannot be considered in isolation but must be tested "in the context of the entire record of the *trial*." *United States* v. *Park*, 421 U.S. 658, 674-675, quoting from *United States* v. *Birnbaum*, 373 F. 2d 250, 257 (C.A. 2), certiorari denied, 389 U.S. 837 (emphasis in original). Viewed in this manner, the district court's instructions to the jury did not deprive petitioner of a fair trial.

The record indicates that the only material representations[6] at issue in this case were petitioner's statements in the applications for both credit cards that he would pay for any charges incurred. Thus, representatives of the defrauded corporations testified at trial that the minor misrepresentations in each application concerning petitioner's

[5]Petitioner also appears to suggest (Pet. 11) that Section 1644 is unconstitutionally vague on its face because it fails to define "fraudulently obtained." However, the term clearly means "conscious wrongdoing, an intention to cheat or be dishonest" (*United States* v. *Wunderlich*, 342 U.S. 98, 100) and is a universally understood concept. See *Weiss* v. *United States*, 122 F. 2d 675, 681 (C.A. 5), certiorari denied, 314 U.S. 687 ("The law does not define fraud; it needs no definition; it is as old as falsehood and as versable as human ingenuity.")

[6]A representation of fact is material if it has the natural tendency to influence, or is capable of influencing, the decision of one to whom it is directed (see *United States* v. *Krause*, 507 F. 2d 113, 118 (C.A. 5); *United States* v. *Paoli*, 505 F. 2d 971, 973 (C.A. 4); *United States* v. *Devitt*, 499 F. 2d 135, 139 (C.A. 7), certiorari denied, 421 U.S. 975), with the person to whom it is directed judged by a standard of ordinary prudence. *United States* v. *Mandel*, 415 F. Supp. 997, 1006 (D. Md.).

ownership interest in New Era Printing or his business address could not have affected their decision whether to issue a credit card to petitioner, and at no time did the government contend that petitioner had committed the alleged offense by failing to reveal an important fact. To the contrary, as the court of appeals noted (Pet. App. 3a-4a), the "Government's theory * * * was that [petitioner] misstated his intention to pay for the charges at the time he applied for the cards" and that Diner's Club and American Oil Company "would not have issued the cards had they known of [petitioner's] intent not to pay * * *." See, *e.g.*, Tr. 383.

Hence, the ultimate issue for the jury to decide was the fact-bound and narrow question of petitioner's intent regarding payment when he applied for the credit cards, a matter that unquestionably was material. There was no reason for the jury to speculate "as to what facts a 'reasonably prudent' credit company would want to know before issuing a credit card" (Pet. 11); indeed, the jury was expressly admonished not to engage in such speculation by the trial judge's further instruction that it should "not mention nor refer to, nor take into consideration any matter, fact, or circumstances, other than the testimony and evidence that has been admitted before you, all of which I instruct you particularly to observe and obey" (Ch. 9). At bottom, therefore, this case involves not the constitutional issue petitioner suggests but rather the unexceptional situation where two credit card companies "requested a representation as to [petitioner's] intention to pay the charges incurred [by use of their cards], and the

jury found this intention to have been misrepresented" (Pet. App. 4a).[7]

2. Petitioner contends (Pet. 16-20), however, that if the court of appeals' conclusions concerning the breadth of Section 1644 and the validity of the district court's jury instructions are accepted, it would result in his being convicted merely for failure to pay his debts, in violation of the Thirteenth Amendment and the Due Process Clause of the Fifth Amendment. This claim is belied by the record, which indicates that petitioner was found guilty on the basis of far more than mere nonpayment of debts.

Not only did the evidence show that on each credit card application petitioner made minor misrepresentations about his income, ownership of New Era Printing, or business address, but also there was "a remarkable similarity in the pattern on both cards of charging nominal amounts for several months and then suddenly and grossly abusing the credit extended to him" by expending extremely large sums of money on travel and gambling (Pet. App. 5a). As the court of appeals correctly held, in these circumstances there was sufficient evidence from which the jury could reasonably have inferred that from the outset petitioner never intended to comply with the terms of the credit agreement; hence, he was not convicted for a failure at some later time to meet his financial obligations, but

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[7] *Bouie* v. *City of Columbia*, 378 U.S. 347, cited by petitioner (Pet. 12), is distinguishable. In that case the Court held that the Due Process Clause prohibited a conviction based upon an unforeseeable judicial enlargement of a criminal statute. See *Marks* v. *United States*, No. 75-708, decided March 1, 1977, slip op. 4. There can be no question, however, that the conduct alleged and proven by the government in this case—use of a credit card procured by the false representation that petitioner intended to pay the charges incurred—falls within the obvious scope of Section 1644.

rather for fraudulent misrepresentations in the initial procurement of the cards.[8]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

BENJAMIN R. CIVILETTI,
Assistant Attorney General.

JEROME M. FEIT,
KATHERINE WINFREE,
Attorneys.

AUGUST 1977.

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[8] *Bailey* v. *Alabama*, 219 U.S. 219, and *Taylor* v. *Georgia*, 315 U.S. 25, upon which petitioner relies (Pet. 18-19), are therefore inapposite. In those cases, the Court reversed convictions for breach of employment contracts on which money had been advanced, where the only proof of fraud was that the contracts had been breached. In each case, the convictions were based on statutes providing that the subsequent failure to perform was *prima facie* evidence of fraudulent intent *ab initio*, and the juries were so instructed. In this case the government relied not on such a presumption but rather on circumstantial evidence of fraudulent intent at the time petitioner applied for the credit cards. Furthermore, unlike in *Bailey* and *Taylor*, petitioner was not forced to perform an employment contract on pain of criminal prosecution and hence could not have been subjected to involuntary servitude in violation of the Thirteenth Amendment and federal statutes.